

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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JERRY CONSTANCE,

*Plaintiff,*

-against-

PEPSI BOTTLING COMPANY OF NEW  
YORK, TERRY NOCHESE, PETER CRIST  
AND SOOKDEO UDAIRAM, aka RICHIE  
UDAIRAM,

*Defendants.*

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AMON, United States District Judge:

NOT FOR PUBLICATION  
MEMORANDUM & ORDER

03-CV-5009 (CBA) (MDG)

This is a employment discrimination case brought by plaintiff Jerry Constance against the Pepsi Bottling Company of New York (“Pepsi”), Terry Nochese, Peter Crist and Sookdeo Udairam, a/k/a Richie Udairam. The defendants moved for summary judgment. On October 24, 2005, the Court referred the summary judgment motion to Magistrate Judge Go for a report and recommendation (“R&R”). On June 18, 2007, Magistrate Judge Go issued her R&R, recommending that the case be dismissed in its entirety. On July 3, 2007, counsel for plaintiff filed objections to the R&R, relying on their previously submitted briefs with respect to counts one through seven, and arguing, with respect to counts eight through eleven, primarily, that defendants’ non-discriminatory reason for terminating plaintiff, job abandonment, “smacks of pretext” and that the question of whether plaintiff’s termination was discriminatory should be put to a jury because there are disputed questions of material fact regarding the reason for the

termination. (Pl.'s Objs. at 5.)<sup>1</sup> Defendants responded to plaintiff's objections mainly by arguing that he simply rehashed arguments already made in the parties' briefs. (Def. Opp. to Pl.'s Objs. at 1-7.) Additionally, as to the last four counts, the defendants argue that plaintiff failed to demonstrate that the legitimate reasons for his firing were pretextual. (Id. at 7-10.)

With respect to counts one through seven, upon a review of the record, the Court finds that Magistrate Judge Go properly disposed of these claims. In counts eight through eleven of the complaint, Constance alleges that he was unlawfully retaliated against for filing an EEOC complaint. As Magistrate Go noted, courts apply the McDonnell Douglas burden-shifting analysis when evaluating retaliation claims. Kessler v. Westchester County Dep't of Soc. Servs., 461 F.3d 199, 205-06 (2d Cir. 2006) (retaliation under Title VII); Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 94-95 (2d Cir. 2001) (retaliation under the ADA). Magistrate Judge Go concluded that Constance showed a prima facie case of retaliation. (R&R at 71.) She found that Pepsi articulated a legitimate, non-discriminatory reason for terminating Constance – job abandonment. (R&R at 44.) Finally, Magistrate Judge Go found that Constance was unable to show that the legitimate, non-discriminatory reason for terminating Constance was pretextual. (R&R at 76.)

Specifically, it is undisputed that Constance failed to show up for his job as directed by Nochese on February 24, 2003, March 17, 2003, and March 24, 2003. (R&R at 45.) Constance argues in his objections that because his doctor, Dr. Mehta, put him on total disability in January

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<sup>1</sup> Plaintiff also mentions other actions taken by defendants which he alleges were retaliatory, such as sending an investigator to his house. The Court does not find that these, alone or together, evidence retaliation, and considers here only his objection that his termination was retaliatory.

of 2003, defendants' letters to plaintiff instructing him to return to work or be fired for job abandonment were pretextual. (Objs. at 8.) However, Constance ignores the fact that Nochese only directed plaintiff to return to work in her letter dated February 20, 2003 after receiving a note from Dr. Mehta dated February 3, 2003 saying that plaintiff was only partially disabled. (Ex. 6<sup>2</sup>, Ex. 7.) The February 20, 2003 letter properly indicated that defendants would abide by any restrictions placed on Constance. (Ex. 7.) In addition, Dr. Mehta cleared Constance for light work on March 13, 2003 (after deeming him totally disabled for some period of time), and Nochese again instructed him to return to work on March 17, 2003 in a letter dated March 14, 2003. Given this, plaintiff has failed to show that there remains a material question of fact to be resolved at trial regarding the reason for his termination. Having given due consideration to the objections raised by the plaintiff, the Court finds them not to be persuasive and adopts the thorough and well-reasoned recommendation of the Magistrate Judge. The Clerk of the Court is directed to close the case.

SO ORDERED.

Dated: Brooklyn, New York  
August 24, 2007

Carol Bagley Amon  
United States District Judge

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<sup>2</sup> Exhibits referenced in this document refer to the exhibits attached to the Affidavit of Terry Nochese.